

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
)	
GARY COONAN)	
)	
)	
)	
RESPONDENT)	CASE NO. WPC07-0212

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Gary Coonan (hereinafter the "Respondent") is the owner of a residential property located on Highway 269 in Rutherford County, Tennessee (hereinafter the "site"). Service of process may be made on the Respondent at 1420 Trotters Lane, Rockvale, Tennessee, 37153.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

V.

Short Creek, referred to herein, is “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. In accordance

with Department Rule 1200-4-4, "Use Classifications for Surface Waters," Short Creek has been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

VI.

T.C.A. §69-3-108 requires a person to obtain a permit from the department prior to the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Pursuant to T.C.A. §69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a §401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VII.

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI), site-specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

FACTS

VIII.

On July 24, 2007, the Rutherford County Building Codes Department (RCBCD) received a complaint regarding construction activities taking place at the site. Personnel with the RCBCD visited the site the same day and observed that the Respondent had operated mechanical equipment in a creek on the site, built a bridge across the creek, and conducted construction activities without a building permit.

IX.

On July 31, 2007, the RCBCD issued a stop work order to the Respondent. The stop work order notified the Respondent that all work on the site should cease until the following requirements had been satisfied:

- Obtain ARAP and TNCGP coverage from the division and submit copies to the RCBCD office.
- Submit a site construction plan for approval by the county engineer.

X.

On August 8, 2007, the RCBCD issued a second stop work order to the Respondent. The stop work order required the Respondent to satisfy the same requirements listed in the July 31, 2007, stop work order, before construction could proceed.

XI.

On August 10, 2007, the division conducted a complaint investigation at the site, and discovered that unauthorized construction activities and stream alterations had taken place. Division personnel observed that a 20 ft. long bridge had been constructed over Short Creek. In addition, the stream channel had been excavated to the south of the bridge and an impoundment had been built. To the north of the bridge mechanized land disturbance had been performed and Short Creek had been widened and deepened creating a depression of pooled water, which affected the flow of Short Creek. Furthermore, roads, a pad for a future structure, and two ponds east of Short Creek had been constructed resulting in the disturbance of more than one acre of land without TNCGP. Additionally, erosion prevention and sediment control (EPSC) measures at the site were inadequate and improperly installed and maintained, resulting in a migration of sediment into Short Creek causing a condition of pollution.

XII.

On August 13, 2007, the division received an application for an ARAP from the Respondent.

XIII.

On August 23, 2007, the division issued a Notice of Violation (NOV) to the Respondent citing the violations observed during the August 10th site visit. The NOV required the Respondent to immediately stabilize the disturbed areas and to install any

necessary EPSC measures to prevent additional sediment from leaving the site. The NOV also required submittal of a NOI, SWPPP, and associated fee to obtain TNCGP coverage within 15 days of receipt of the NOV. In addition, the NOV required the Respondent to submit a corrective action plan (CAP) to the division within 30 days of receipt of the NOV.

XIV.

On September 14, 2007, the division conducted a follow-up inspection at the site, and observed pooled water, resulting from the construction of the impoundment, to the south of the bridge and in-stream excavation to the north of the bridge. EPSC measures were inadequate, improperly installed, and in need of maintenance. The lack of appropriate EPSC measures resulted in the migration of sediment off site and into Short Creek, causing a condition of pollution.

XV.

To date, the division has not received a NOI, SWPPP, and associated fee to obtain coverage under the TNCGP.

VIOLATIONS

XVI.

By physically altering waters of the state without authorization under an ARAP, and by conducting construction activities without authorization under the TNCGP, the Respondent has violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which state:

T.C.A. §69-3-108:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
 - (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
 - (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

T.C.A. § 69-3-114 (b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVII.

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondent has violated T.C.A. §§69-3-114(a), referenced below, and 69-3-114(b), as referenced above.

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondents shall within SEVEN (7) DAYS, implement appropriate EPSC measures to ensure that no eroded material leaves the site and enters waters of the

state. Documentation that EPSC measures have been implemented is to be sent, within 15 days of receipt of this Order and Assessment, to the manager of the division's Nashville Environmental Field Office (N-EFO) located at 711 R.S. Gass Blvd, Nashville, Tennessee, 37243.

2. The Respondent shall, within SEVEN (7) DAYS of receipt of this Order and Assessment, stabilize the area around Short Creek to prevent the migration of sediment into the creek.
3. The Respondent shall, within FOURTEEN (14) DAYS of receipt of this Order and Assessment, submit for division approval a CAP for the removal of the constructed impoundment and sediment accumulations from the impacted portions of Short Creek. The plan shall include, but not be limited to, the methods to be used during removal activities, EPSC measures to be utilized during removal activities, and a schedule of implementation for the proposed activities. In addition, the plan should include specific steps the Respondent will take to remove the impoundment in Short Creek and return the stream to its base flow. The plan shall be submitted to the manager of the division's N-EFO. A copy shall also be submitted to the manager of the division's Enforcement and Compliance Section (E&C) located at 401 Church Street, L&C Annex 6th Floor, Nashville, Tennessee, 37243.
4. The Respondent shall, within THIRTY (30) DAYS of division approval, complete the activities outlined in the approved corrective action plan and notify the manager of the division's N-EFO upon completion.

5. The Respondent is hereby assessed a CIVIL PENALTY in the amount of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00).

- a. The Respondent shall pay FOUR THOUSAND FIVE HUNDRED DOLLARS (\$4,500.00) to the division within THIRTY (30) DAYS of receipt of this Order.
- b. The Respondent shall pay FOUR THOUSAND DOLLARS (\$4,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.
- c. The Respondent shall pay TWO THOUSAND DOLLARS (\$2,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 2 above in a timely manner.
- d. The Respondent shall pay THREE THOUSAND DOLLARS (\$3,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 3 above in a timely manner.
- e. The Respondent shall pay FOUR THOUSAND DOLLARS (\$4,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 4 above in a timely manner.

6. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent

shall submit a written request to be received a minimum of THIRY (30) DAYS in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing.

The director will reply to the Respondent's request in writing. Should the Respondent fail to meet the requirement by the extended date, any associated CIVIL PENALTY shall become due THIRTY (30) DAYS thereafter.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the Director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 22nd day of October, 2007.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.

Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel (OGC) a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence

at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the “Treasurer, State of Tennessee,” and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, at 6th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243-1534. Please write your case number on all payments and all correspondence concerning this matter.